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No. 00-200

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner refers the Court to page ii of the Petition.

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Rule:

United States Supreme Court Rule 10(c) 2

In its opposition to Seguros La Republica's ("La Republica") Petition for Certiorari, British International Insurance Company Limited ("BIIC") argues that this Court should deny the petition because La Republica has not presented a compelling reason to review the constitutionality of Section 1213 of the New York Insurance Law, N.Y. Ins. Law § 1213 ("Section 1213"), and because La Republica mistakenly relies upon this Court's holding in *Doehr v. Connecticut*, 501 U.S. 1 (1991). Both of BIIC's arguments are incorrect. The issue of the constitutionality of Section 1213, and the other twenty-six similar statutes which require a reinsurer to post a sizable bond before it can answer a complaint filed against it, without a court first making any determination of the merits of the plaintiff's claim, is a significant issue which this Court should address. The Second Circuit correctly recognized that this Court's ruling in *Doehr* provides the standards by which the constitutionality of Section 1213 should be determined, but it failed to properly apply that standard.

I.

LA REPUBLICA'S PETITION PRESENTS A COMPELLING REASON TO REVIEW THE CONSTITUTIONALITY OF SECTION 1213 OF THE NEW YORK INSURANCE LAW

The State of New York, as well as twenty-six other states, have enacted statutes requiring a reinsurer to post a bond of sufficient size to satisfy a judgment against it before the reinsurer may defend that suit. Petition for Certiorari, p. 18 n.3. There is no preliminary review of the merits of the plaintiff's claim before the bond is imposed, and if the reinsurer does not, or cannot, post the bond, then any answer filed by the reinsurer is stricken and default judgment is

entered against it, again without the court reviewing the merits of the plaintiff's claim. These statutes violate the reinsurer's right to due process, and the Second Circuit's ruling in this case upholding the constitutionality of this statute conflicts with this Court's decision in *Doehr*. La Republica's petition clearly presents a compelling reason for this Court to review the constitutionality of Section 1213 of the New York Insurance Law. Rules of the Supreme Court, Rule 10(c) (reasons Court may grant petition for writ of certiorari includes "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court").

BIIC also claims that La Republica has not sustained its burden of showing that Section 1213 is unconstitutional. BIIC first argues that when the National Association of Insurance Commissioners ("NAIC") first promulgated its Uniform Unauthorized Insurers Act in 1948, upon which Section 1213 is based, the NAIC drafted this act within the constitutional bounds set forth in *Ownbey v. Morgan*, 256 U.S. 94 (1921). Brief in Opposition, p. 5. However, the constitutional standards described in *Ownbey* are no longer consistent with this Court's current due process rulings. *Shaffer v. Heitner*, 433 U.S. 186, 194 n.10 (1977) ("We do not read the recent references to *Ownbey* as necessarily suggesting that *Ownbey* is consistent with more recent decisions interpreting the Due Process Clause"). BIIC also argues that the New York courts have "repeatedly upheld the constitutionality" of Section 1213 and its predecessor statute. Brief in Opposition, p. 6. However, three of the New York cases cited by BIIC, *Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951); *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 120 N.Y.S.2d 418 (1st Dept. 1953), and *Kaye v. Doe*, 125 N.Y.S.2d 135 (Sup. Ct. Bronx

Co. 1953), simply did not address the constitutionality of Section 1213's pre-answer bond requirement. In the fourth New York case, *Curiale v. Ardra Insurance Co., Ltd.*, 88 N.Y.2d 268 (1996), the New York Court of Appeals upheld the constitutionality of this statute only by erroneously deciding that the bond requirement was not an impairment of a property right which merited due process protection. Finally, BIIC argues that no other court has found statutes similar to Section 1213 to be unconstitutional. Brief in Opposition, p. 4. However, as La Republica stated in its Petition, none of those cases correctly applied the due process standards set forth by this Court in *Doehr*. Petition for Certiorari, p. 20. This Court should grant La Republica's petition because the Second Circuit, while acknowledging that the constitutional standards in *Doehr* are applicable to Section 1213, it did not properly apply those standards in this case.

II.

THIS COURT'S HOLDING IN *DOEHR* IS APPLICABLE TO DETERMINING THE CONSTITUTIONALITY OF SECTION 1213

BIIC argues that La Republica's reliance upon this Court's holding in *Doehr* "is completely without merit" and that "the *Doehr* line of cases is readily distinguishable." Brief In Opposition, p. 10. This argument completely ignores the Second Circuit's ruling in both this case and in *Stephens v. National Distillers and Chem. Corp.*, 69 F.3d 1226 (2d Cir. 1995), as well as common sense.

BIIC first argues that Section 1213 is not an attachment because it does not deprive La Republica of any property interest. Brief in Opposition, p. 11. This argument was

correctly rejected by the Second Circuit in this case, when it held that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *British International Insurance Company Limited v. Seguros La Republica*, 212 F.3d 138, 141 (2d Cir. 2000), *quoting*, *Doehr*, 501 U.S. at 12. Because Section 1213 requires a reinsurer to post a bond, the reinsurer "would have no access to those assets . . . [which] is precisely the same result that would obtain if the . . . assets were formally attached." *British International*, 212 F.3d at 142, *quoting*, *Stephens*, 69 F.3d at 1229. Thus, the Second Circuit held that the "analysis of whether § 1213's security requirement comports with due process . . . must proceed in light of the conclusion in *Stephens* that this requirement constitutes an 'attachment' of the foreign insurance company's property." *Id.*

BIIC next argues that there is no risk of erroneous deprivation of property under Section 1213 because La Republica was afforded both notice and a hearing. Brief in Opposition, p. 11. However, BIIC does not address the fact that in that hearing the court did not address the merits of BIIC's claim and it prohibited La Republica from doing so, holding that "the merits of the case have no bearing on the posting of security." Pet. App. G at 41a. Therefore, the "notice" and "hearing" afforded by Section 1213 are illusory. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (HARLAN, J, concurring) (1969) ("I think that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use"). The risk of erroneous deprivation is

clearly demonstrated in this case by the fact that the Second Circuit vacated and remanded a portion of the judgment entered against La Republica. Pet. App. B at 17a-18a.

Finally, BIIC argues that both its interests and those of the State of New York are sufficient to uphold the constitutionality of Section 1213. BIIC first argues that one of Section 1213's purposes is to ensure the collection "of reinsurance balances owed to it under the Facultative Certificates." Brief in Opposition, p. 12. However, this *de minimus* interest does not justify an attachment of La Republica's assets "without a hearing to determine the likelihood of recovery." *Doehr*, 501 U.S. at 16. BIIC also relies on the State of New York's interest in ensuring that reinsurers such as La Republica comply with its licensing requirements. Brief in Opposition, p. 19. However, the State of New York does not require reinsurers such as La Republica to obtain licenses in order to lawfully enter into reinsurance transactions, including those which are the subject matter of this lawsuit. Petition for Certiorari, pp. 6-7.[1] Thus, neither BIIC nor the State of New York have any interests sufficient to support the constitutionality of Section 1213.

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1. BIIC argues that Section 1108 of the New York Insurance Law, N.Y. Ins. Law § 1108, does not include reinsurers within the categories of insurers exempt from licensing requirements. Brief in Opposition, p. 19. This argument misreads the New York Insurance Law. Section 1102(a) of the New York Insurance Law, N.Y. Ins. Law § 1102(a), provides that "No person, firm, association, corporation or joint-stock company shall do an *insurance business* in this state unless authorized by a license . . ." (emphasis added). However, the term "insurance business" does not include reinsuring risks of insurance companies. N.Y. Ins. Law. § 1101(b)(2)(G). Since La Republica is not engaging in an "insurance business," it does not need an insurance license. Section 1108 only applies to certain insurers otherwise engaging in an "insurance business" which the New York legislature has determined do not need a license to do so.

CONCLUSION

For the reasons stated herein, and in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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